Court of Appeals reaffirms the theory expressed in the earlier case in the Circuit Court, that the right attaches to the consumer's land by operation of law, that is, by reason of beneficial use—and not by reason of the agreement between the irrigation company and the consumer. It should be noted that one of the three judges in the Circuit Court of Appeals filed a dissenting opinion.[8]

A. R. G.

Wills: Parol Evidence to Expain Ambiguity and Misconceptions.—In the Estate of Donellan,[1] the testatrix left one-fourth of the residue of her property to her niece, Mary, a resident of New York, daughter of her deceased sister, Mary. The evidence disclosed two daughters of the sister, Annie and Mary. Annie, the elder of the two daughters, married in Ireland, came to this country, settled in Brooklyn, New York, and still lived there when the present case arose. Mary never came to this country and still lived in Ireland. The evidence also showed that testatrix knew of the existence of but one niece; that when Annie was six years old at the time of the death of her father, testatrix wanted her to come to live with her; that testatrix wrote to a Boston relative inquiring about her niece and was referred by the relative to the New York niece; that Annie was called Mary by a relative in Boston with whom she lived when she first came to this country. This was substantially all the evidence, except some hearsay erroneously admitted. The Superior Court held the will applied to Mary, relying upon the maxim that the name controlled the description. The Supreme Court refused to consider this maxim as binding and directed the trial court to construe the clause to apply to Annie, unless on a rehearing further evidence should require a different decision, upon the ground that testatrix meant the niece who came to this country.

The method of solution of the Supreme Court is in accord with modern theory. Under the older view the will must speak for itself without resort to extrinsic evidence. As Thayer puts the matter, it is the theory of a "lawyers' Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes."[2] But men do not express themselves with accuracy, and the application of the old theory, while it leads to a kind of certainty, often produces results never contemplated by testators, and justifies the reproach expressed by Randolph of Roanoke that lawyers and

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[8] 197 Fed. 418 (1912).

[1] 44 Cal. Dec. 462 (Sept. 27, 1912).

[2] Thayer, Preliminary Treatise on Evidence at the Common Law, p. 428.

courts of law are extremely addicted to making wills for dead men, which they never made when living. Indeed, this result has been ardently defended: "Surely it is better that the intentions of twenty testators, every week, should fail of effect, than those rules should be departed from, upon the general security of titles and quiet anjoyment of property so essentially depend." [3] Under the modern doctrine, titles are reasonably secure and the will of the testator is more likely to be carried out. Indeed, in the great majority of cases, correct rules of construction will result in effectuating the intention of testators.

The modern theory is that, as a matter of law, the words used in the will must be capable of bearing the meaning or competing meaning sought to be attached to them. In the principal case there can be no question but that there is a sufficient description of the niece Annie. Had Annie been the only niece, no court would have questioned her right to take in spite of the mistake in the name. The testatrix having used words capable of including Annie a pure question of fact remains to be decided from all the evidence and no presumption or artificial rules of construction should prevent the court from giving to the words the meaning the testatrix obviously intended.

There is another question presented in the same case. In accordance with the ruling in the Supreme Court in the Estate of Dominici [4] evidence was admitted of the testatrix's statements of intention to the lawyer who prepared the will. While the general rule in construing a will is that all extrinsic evidence is admissible, there is an exception to the rule by the exclusion of declarations of intention. It is considered dangerous to permit the solemn written expression in the will to be affected by other statements of the testator as to what he intended. In one case, however, such statements have always been admitted, the case of equivocation, where the bequest is to "my niece Mary" and there are two nieces named Mary. In such a case the declarations of the testator are admitted to show which niece was meant. The will in the present case, however, is not one of equivocation but of misdescription; neither niece fits the requirements accurately. One niece satisfies the description by residence but not by name, the other by name but not by residence. Under these facts the English courts have refused to admit declarations of intention although it is hard to see why the same principle that applies to "equivocation" should not apply to "misdescription." In fact English judges have been unable to see the distinction.[5] In admitting the statements made by the testatrix to the lawyer in the principal case the court is in accord with sound theory and authority in this country.

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[3] Fearne, Contingent Remainders, p. 172, quoted in Wing v. Angrave, 8 H. L. Cas. 183, 216 (1860) by that strict old conservative, Lord Wensleydale (Baron Parke).

[4] 151 Cal. 181; 90 Pac. 448 (1907).

[5] "Why the law should be so, in cases where some error of description involving a latent ambiguity has to be corrected, when evidence of the same kind is admitted in what Lord Bacon describes as cases of

It may be questioned, however, whether this result, commendable as it is on principle, has been achieved without doing violence to Sec. 1340 of the Civil Code. The annotations of the Code Commissioners show that they recognize the conflict in the decisions and deliberately adopted the English rule as established in Doe v. Hiscocks.[6] The distinction which the court draws in the Estate of Dominici, supra, between instructions to the lawyer preparing the will, and what the court calls the "incidental, fugitive utterances or declarations of intent" is, we submit, not well founded, and moreover is undesirable in that it adds another distinction where there are already too many. The English cases exclude evidence of the instructions to the solicitor.[7]

The fact is that the law of evidence has developed in the past years, and a much better statement of the rules than is contained in the Code, can be made today. Writers such as Stephen and Professor Wigmore have defined the rules with accuracy, while others such as Thayer have traced the historical development. The California Code has crystallized and perpetuated the errors and obscurities of a former generation. The California courts are confronted with the choice of making a narrow and unjust ruling, or of straining the words of a code section beyond the ordinary meaning of language. Who can say that the court chose wrongly? A. M. K.

"equivocation" (Maxims of the Law, Rule XXIII), I am not sure that I clearly understand, but it has been conclusively so settled by a series of authorities to which we are bound to adhere." Charter v. Charter, L. R. 7 H. L. 364 (1874).

[6] 5 M. & W., 363 (1839).

[7] Drake v. Drake, 8 H. L. C 172 (1860).